Supreme Court, U.S.
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No. 85-389

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

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JOHN J. CHAPMAN, *et al.*,
*Petitioners,*

v.

ROBERT E. LUNA, PH.D., *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari to the New Mexico Supreme Court**

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## PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... ii

POINT 1

THIS COURT SHOULD DISREGARD RESPONDENTS' BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI BECAUSE IT IMPERMISSIBLY ARGUES THE MERITS OF THE CASE ..... 1

POINT 2

EVEN IF IT WERE PERMISSIBLE TO ARGUE THE MERITS OF THE CASE, THE MATTERS RAISED BY RESPONDENTS HAVE ALL BEEN HERETOFORE DISPOSITIVELY DETERMINED BY THIS COURT IN FAVOR OF THE POSITION ADVOCATED BY PETITIONERS ..... 2

POINT 3

THE CASES CITED BY RESPONDENTS ARE INAPPOSITE ..... 3

CONCLUSION ..... 4

# TABLE OF AUTHORITIES


| SUPREME COURT CASES | Page |
|---|---|
| *City of Cleburne v. Cleburne Living Center*, 53 U.S.L.W. 5022 (1985) | 5 |
| *Gardner v. Luckey*, 423 U.S. 841 (1975) | 3 |
| *Hensley v. Eckerhart*, 461 U.S. 424 (1983) | 2, 3 |
| *Maher v. Gagne*, 448 U.S. 122 (1980) | 3 |
| *Maine v. Thiboutot*, 488 U.S. 1 (1980) | 3 |
| *Metropolitan Life Insurance Co. v. Ward*, 53 U.S.L.W. 4399 (1985) | 5 |
| *Monell v. New York City Department of Social Service*, 436 U.S. 658 (1978) | 3 |
| *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1967) | 3 |
| *Webb v. Board of Education*, 105 S.Ct. 1923 (1985) | 4 |
| *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982) | 3 |
| *Williams v. Vermont*, 153 U.S.L.W. 4659 (1985) | 5 |
| **OTHER JURISDICTIONS** | |
| *Estes v. Tuscaloosa County*, 696 F.2d 898 (11th Cir. 1983) | 4 |
| *Founding Church of Scientology of Washington, D.C. Inc. v. Director, Federal Bureau of Investigation*, 459 F.Supp. 748 (D.D.C. 1978) | 3 |
| **STATUTES** | |
| Title 42, United States Code, § 1983 | 4 |
| **MISCELLANEOUS** | |
| Supreme Court Rule 22 | 1 |
| Supreme Court Rule 34 | 2 |

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## PETITIONERS' REPLY BRIEF

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### POINT 1

### THIS COURT SHOULD DISREGARD RESPONDENTS' BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI BECAUSE IT IMPERMISSIBLY ARGUES THE MERITS OF THE CASE

Rule 22 of the Rules governing procedure before this Court provides that a Respondent may file "an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court". Instead of confining their Brief in Opposition to the sole permissible issue—whether this Court should grant certiorari—Respondents have improperly filed a Brief on the merits, prematurely arguing the substantive law. Respondents'

Brief might be proper under Rule 34, after entry of an order granting certiorari, but it is inappropriate at this preliminary stage in the proceedings. The only issue now before this Court is whether to review the decision below. This Court should therefore disregard Respondents' Brief in Opposition which addresses the outcome of review.

## POINT 2

### EVEN IF IT WERE PERMISSIBLE TO ARGUE THE MERITS OF THE CASE, THE MATTERS RAISED BY RESPONDENTS HAVE ALL BEEN HERETOFORE DISPOSITIVELY DETERMINED BY THIS COURT IN FAVOR OF THE POSITION ADVOCATED BY PETITIONERS

While Petitioners discuss the merits of the matter with great reluctance, the Respondents' Brief in Opposition requires a brief review of the cases this Court has already decided.

Respondents allege that Petitioners did not allege or prove a specific "injury" or seek "any personal relief, in the form of damages or equitable relief, against Respondents" or allege any personal deprivation of rights. Brief in Opposition, pp. 5-7. These defenses to the award of attorney's fees have been considered, and specifically rejected, by this Court. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Hensley* holds that if the suit provides "some benefit to plaintiffs or some vindication of their rights", fees should be awarded. In the instant case, the benefit sought was the termination of a program considered unlawful by Petitioners and the declaration that the ordinance promulgating that program was unlawful. The New Mexico Supreme Court declared the ordinance unlawful, the City repealed it, and the program has been terminated. To say that Petitioners obtained "some benefit" that they sought would be an understatement.

Insofar as Respondents allege that Petitioners needed to seek damages in order to be awarded fees (Brief in Opposition at p. 5), this Court has already rejected Respondents' argument in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *Monell* stands for the proposition that litigants who bring a successful equal protection challenge to a municipal ordinance and obtain a declaratory judgment so holding *are* entitled to attorney's fees. Of accord, *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1967).

Insofar as Respondents claim that attorney's fees should be denied because § 1983 was not specifically pled (Brief in Opposition at p. 6), that argument has been specifically rejected by this Court and others. *Maine v. Thiboutot*, 488 U.S. 1 (1980); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); and *Founding Church of Scientology of Washington D.C. Inc. v. Director, Federal Bureau of Investigation*, 459 F.Supp. 748 (D.D.C. 1978). Insofar as Respondents challenge whether Petitioners were "prevailing parties", that argument was specifically rejected by this Court in *Hensley, supra*, and *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982). Insofar as Respondents claim that the Motion for Attorney's Fees was untimely, that argument was specifically rejected by this Court in *White v. New Hampshire Department of Employment Security, supra.*

## POINT 3

## THE CASES CITED BY RESPONDENTS ARE INAPPOSITE

Respondents rely on *Gardner v. Luckey*, 423 U.S. 841 (1975), for the proposition that the Complaint "must allege that the plaintiff himself was injured by the conduct of the public officials". Brief in Opposition at 6. The plaintiffs in *Gardner* alleged that the State Public Defender's offices failed to meet constitutional standards

in the representation of indigents. The Fifth Circuit upheld the dismissal of the Complaint because no plaintiff alleged that he was among the group of people injured by the conduct of the Public Defenders and, even had there been such an allegation, the appropriate remedy would have been by way of habeas corpus. In the present case, the Petitioners, as residents of Bernalillo County, are clearly within the class of people that would have been subject to the program and would therefore have suffered a deprivation of their right to equal protection had the program been implemented as originally created. Additionally, Petitioners had no alternate means of relief, and the New Mexico Supreme Court did find the matter within its jurisdiction and granted the relief requested.

*Estes v. Tuscaloosa County*, 696 F.2d 898 (11th Cir. 1983), and *Webb v. Board of Education*, 105 S.Ct. 1923 (1985), cited by Respondents are similarly inapplicable to the present case. *Estes* held that a plaintiff who could not establish a deprivation of a constitutionally protected right was not entitled to a § 1983 award. Petitioners, however, have already prevailed on a claim of deprivation of equal protection. *Webb* held that attorney's fees may not be awarded in a § 1983 action for work done in a prior administrative hearing. Petitioners, however, seek attorney's fees only for work done in the judicial proceedings in this case.

## CONCLUSION

The issue raised by the Petition for Writ of Certiorari is whether a State can declare its constitutional equal protection provision identical to the correlative federal provision, yet thereafter sever from that declaration the matter of entitlement to attorney's fees for the vindication of an equal protection deprivation. Respondents have utterly failed to address that issue. There is a good reason for their failure; the Opinion of the New Mexico

Supreme Court which makes such a declaration is unprecedented and illogical. It cannot be supported by case law or reason. However, if allowed to stand, the Opinion of the New Mexico Supreme Court will serve as precedent for a pernicious erosion of the equal protection clause in direct derogation of cases decided in this Court's last term which appear to stand for a growing equal protection clause. *City of Cleburne v. Cleburne Living Center*, 53 U.S.L.W. 5022 (1985); *Metropolitan Life Insurance Co. v. Ward*, 53 U.S.L.W. 5399 (1985); and *Williams v. Vermont*, 53 U.S.L.W. 4659 (1985).

To avoid such a conflict, which would ultimately increase the burden on this Court and the entire federal judiciary, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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